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In the

Supreme Court of the United States

OCTOBER TERM, 1957

No. [redacted] 20

JAMES CLIFTON HAWKINS,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Tyler, Texas,
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December 2, 1957

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THE UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled case on November 9, 1957.

CITATIONS TO OPINIONS BELOW

The judgment and commitment of the United States District Court for the Northern District of Oklahoma

(R. 4)* is unreported and is printed in Appendix B hereto, infra, pages 9-10.

The judgment and sentence of the United States Court of Appeals for the Tenth Circuit (R. 8) is unreported and is printed in Appendix B hereto, infra, pages 10-11.

The opinion of the United States Court of Appeals for the Tenth Circuit (R. 3-7) is unreported and is printed in Appendix B hereto, infra, pages 11-13.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on November 9, 1957 (R. 3-7), pages 10-11, infra. The jurisdiction of this Court is invoked under *28 U. S. C. Sec. 1254(1)* and *Federal Rules of Criminal Procedure, Rule 22(2)*.

QUESTION PRESENTED

Whether a wife is a competent witness against her husband who is charged with a criminal offense wherein no injuries to the wife are involved.

STATUTES INVOLVED

The statutory provisions and rules involved are: Act of June 25, 1948, c. 645, Sec. 1, 62 Stat. 846, amended Act of May 24, 1949, c. 139, Sec. 60, 63 Stat. 98, 18 U. S. C. 3772,

*Footnote: *R.* refers to the transcript of record of the proceedings in the Court of Appeals for the Tenth Circuit. The numeral following R. refers to the page in such transcript and the numerals contained in the inner parenthesis refer to the pages of the transcript of record of the proceedings in the United States District Court for the Northern District of Oklahoma which was filed in the office of the Clerk of the United States Court of Appeals for the Tenth Circuit.

and *Federal Rules of Criminal Procedure, Rule 26.* They are printed in Appendix A, infra, pages 7-8.

STATEMENT

Petitioner was tried and convicted in the United States District Court of the Northern District of Oklahoma for a violation of the statute referred to as the Mann Act. [R. 1 (3)]. The jurisdiction of that Court was invoked by an indictment of the grand jury of such court [R. 1 (3)]. The evidence was that before the transportation of one Lola Fay Moudy in interstate commerce she had a conversation with Petitioner in which Petitioner asked her if she wanted to go up to Tulsa and work with Jane [R. 1 (8)]; and that she understood that working with Jane meant working as a prostitute [R. 1 (9)]. Erma Lane Hawkins called as a witness in behalf of the United States testified that she was married to the Petitioner and that she had never been divorced and, over the objection by Petitioner, Erma Lane Hawkins also testified that she used the name of Jane Wilson and was a prostitute during the month of November, 1955. [R. 1 (35-37)].

Petitioner appealed such judgment of conviction to the United States Court of Appeals for the Tenth Circuit and such Court affirmed such judgment stating that such Court had committed itself to the view that a wife is a competent witness against her husband on the trial of a criminal case in which he is charged with the crime and that if the wife were incompetent the above testimony by her which the United States elicited from her was harmless. (R. 3-7.)

REASONS FOR GRANTING THE WRIT

1. The decision of the Court below in the instant case is in direct conflict with the decisions in *Brunner v. United States, 168 F. 2d 281 (6th Cir. 1948); United States v. Walker, 176 F. 2d 564 (2nd Cir. 1949), cert. den. 338 U. S. 891, 70 S. Ct. 239, 94 L. Ed. 547 (1949);* subsequent trial appealed on other grounds, *190 F. 2d 481 (2nd Cir. 1951), cert. den. 342 U. S. 868, 72 S. Ct. 109, 96 L. Ed. 653 (1951), reh. den. 342 U. S. 899, 72 S. Ct. 229, 96 L. Ed. 673 (1951);* motion to vacate judgment denied and affirmed, *197 F. 2d 287 (2nd Cir., 1952),* and *Paul v. United States, 79 F. 2d 561 (3rd Cir. 1935).*

In the instant case as in the *Brunner case, Walker case* and *Paul case,* one spouse was permitted in the trial court to testify against her husband or his wife in a criminal case wherein no personal injuries or harm to such husband or wife were involved and in all of these cases the different United States Courts of Appeals recognized the common law rule prohibiting one spouse from testifying against her husband in a criminal case. In the instant case the Court below preferred to hold contrary to such common law rule and in the *Bruner, Walker* and *Paul cases* the respective circuits preferred to follow the common law rule that the spouse is an incompent witness against the other spouse in a criminal case.

These decisions and their reasoning are in conflict and the language used in the opinions is so strong that it appears that this conflict will remain until resolved by this Court.

2. The decision of the Court below is believed to be in conflict with applicable decisions of this Court in the case of *Graves v. United States, 150 U. S. 118, 14 S. Ct. 40, 37 L. Ed. 1021 (1893)*. In the *Graves case* the trial court allowed the prosecuting attorney to comment on the failure of the defendant's wife to testify. This Court in its decision said that the Defendant's wife was an incompetent witness and that by reason of such incompetency the comment was improper.

3. The Court below has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned departure by the trial court, as to call for an exercise of this Court's power of supervision in that, such decision is an admitted departure of the common law rule that a spouse is an incompetent witness against the other spouse in the trial of a criminal case, and is thereby contrary to *Rule 26, Federal Rules of Criminal Procedure*. In so holding the Court below followed the dictum of *Yoder v. United States, 80 F. 2d 665 (10th Cir. 1935)*. As pointed out by the Court below, the witness and defendant in the *Yoder case* were divorced at the time of the trial. Since divorce removed the incompetency at common law the decision in the *Yoder case* was in accord with the common law rule. However, the rationale of the Court in the *Yoder case* was in error and the statement that the *Yoder case* was a departure from the common law rule was in error.

In the *Brunner case*, supra, *Walker case*, supra, and *Paul case*, supra, the witnesses and defendants, respectively, were married at the time of the testifying. The testi-

mony in these cases were very strong to establish the guilt of the defendants. Mr. Justice Learned Hand summarizes the reason for the common law rules in *United States v. Walker*, (Page 568):

> "* * * because although it is not very usual for it to arise unless the spouses are estranged, not all estrangements are final, and nothing could more dispose the privileged spouse to treasure enmity and to repulse any overtures of reconciliation the memory of what will ordinarily rankle as treachery."

Since the decision of the Court below is the first utterance of this doctrine this Court should either deny or confirm this departure from the common law rule.

This error cannot be termed harmless in that the testimony of the wife in the instant case was corroboratory and confirmatory in that the testimony of the United States' witness, Lola Fay Moudy, that she understood that the term "working with Jane" meant working as a prostitute was confirmed by the testimony of defendant's wife that she went by the name of Jane Wilson and that at the time of the offense that she was working as a prostitute.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

KENNETH R. KING,
616 Peoples Bank Building,
Tyler, Texas,
Counsel for Petitioner.

December 2, 1957

APPENDIX A

Act of June 25, 1948, c. 645, Sec. 1, 62 Stat. 846, amended Act of May 24, 1949, c. 139, Sec. 60, 63 Stat. 98, 18 U. S. C. 3772.

"The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of practice and procedure with respect to any or all proceedings after verdict, or finding of guilt by the court if a jury has been waived, or plea of guilty, in criminal cases and proceedings to punish for criminal contempt in the United States district courts, in the district courts for the Territory of Alaska, the District of the Canal Zone and the Virgin Islands, in the Supreme Courts of Hawaii and Puerto Rico, in the United States courts of appeals, and in the Supreme Court of the United States. This section shall not give the Supreme Court power to abridge the right of the accused to apply for withdrawal of a plea of guilty, if such application be made within ten days after entry of such plea, and before sentence is imposed.

"The right of appeal shall continue in those cases in which appeals are authorized by law, but the rules made as herein authorized may prescribe the times for and manner of taking appeals and applying for writs of certiorari and preparing records and bills of exceptions and the conditions on which supersedes or bail may be allowed.

"The Supreme Court may fix the dates when such rules shall take effect and the extent to which they shall apply to proceedings then pending, and after they become effective all laws in conflict therewith shall be of no further force.

"Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court."

Federal Rules of Criminal Procedure, Rule 26.

"In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 12,849, Criminal

UNITED STATES OF AMERICA, Plaintiff,

v.

JAMES CLIFTON HAWKINS, Defendant

Judgement and Commitment

"On the 2nd day of October, 1956, came the attorney for the government and the defendant appeared in person and by counsel, Cleon A. Summers.

"It Was Adjudged that the defendant had been convicted upon his plea of not guilty and a verdict of guilty of the offense of having violated Title 18, U. S. C. 2421, as charged in the Indictment.

"It was Adjudged that the defendant was guilty as charged and convicted, and imposition of sentence was passed.

"Now, on this 28th day of November, 1956 came the attorney for the government and the defendant appeared in person and by counsel, Cleon A. Summers. The Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

"It is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Five (5) years.

"It is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

W. R. Wallace
United States District Judge

"Approved as to form: Charles H. Froeb, Assistant U. S. Attorney

"Filed Nov. 28, 1956."

"UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 5646—September Term, 1957

James Clifton Hawkins,

Appellant,

v.

United States of America,

Appellee.

Appeal from the United States District Court for the Northern District of Oklahoma

(November 9, 1957)

Judgment

"Forty-First Day, September Term, Saturday, November 9th, 1957.

"Before Honorable Sam G. Bratton, Chief Judge, and Honorable Walter A. Huxman and Honorable Jean S. Breitenstein, Circuit Judges.

"This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Oklahoma and was argued by counsel.

"On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

"It is further ordered by this court that James Clifton Hawkins, appellant, surrender himself to the custody of the United States Marshal for the Northern District of Oklahoma, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court."

OPINION

(November 9, 1957)

"Cleon A. Summers for appellant.

"Russell H. Smith, First Assistant, United States Attorney, (B. Hayden Crawford, United States Attorney, was with him on the brief) for appellee.

"Before BRATTON, Chief Judge, and HUXMAN and BREITENSTEIN, Circuit Judges.

"BRATTON, Chief Judge.

"The Indictment in this case charges that appellant transported a girl in interstate commerce from Mena, Arkansas, to Tulsa, Oklahoma, for immoral purposes. The jury found appellant guilty; the court sentenced him to imprisonment; and he appealed.

"Error is predicated upon the action of the court in permitting the wife of appellant to testify as a witness for the government. With certain exceptions which have no bearing here, it was the general rule at common law that neither husband nor wife was competent to give testimony as a witness for or against the other in any case, civil or criminal; and for a long period of time that rule was consistently iterated, reiterated, and applied in the United States courts. Stein v. Bowman, 13 Pet. 209, 221; Lucas v. Brooks, 18 Wall. 436, 452; Stickney v. Stickney, 131 U. S. 227; Graves v. United States, 150 U. S. 118; Hendrix v.

United States, 219 U. S. 79, 91; Jin Fuey Moy v. United States, 254 U. S. 189. But it later became a settled rule in the United States courts that the wife of a defendant on trial for a criminal offense is a competent witness in his behalf. Funk v. United States, 290 U. S. 371. That case did not involve and the court did not determine the question whether a wife is a competent witness against her husband on the trial of a criminal case in which he is charged with an offense. But in Yoder v. United States, 80 F. 2d 665, this court committed itself to the view that a wife is a competent witness to give testimony against her husband on the trial of a criminal case in which he is charged with a crime. There, the witness and the defendant had been divorced prior to the time of the trial but the court did not place its decision upon that basis. Instead, the court expressly placed its decision upon the underlying ground that a wife is a competent witness for the government in a criminal case in which her husband is being tried for a criminal offense; and we are content to follow that case without any effort to amplify or elucidate further its undergirding philosophy.

"But let it be assumed for the moment that the witness was not competent to give testimony against her husband. Laying aside the testimony which the government elicited from the witness, these facts were established upon the trial. The prosecutrix, a girl seventeen years of age, lived with her parents near Dogpatch, Oklahoma, a place consisting of two buildings, one a tavern in which she worked as a waitress and the other a dance hall owned by appellant. In November, 1955, the prosecutrix told appellant that she wanted a better job which paid more money and he asked her if she cared to go to Tulsa and work with Jane. She understood that he meant to work as a prostitute in a hotel, and she agreed to do so. The following day, they drove to Mena and thence to Tulsa in appellant's automobile. They stopped at a filling station on the outskirts of Tulsa along towards daylight, and appellant made a telephone call. In about thirty minutes, Jane and a woman referred to as Tommie came to the filling station. The

prosecutrix went with Jane and Tommie to Jane's room in a hotel where Jane gave the prosecutrix advice respecting practices in the trade. The prosecutrix then went to another hotel, registered, and worked as a prostitute for two days before being arrested. Tommie furnished the money with which to pay the fine imposed upon the prosecutrix. After the fine was paid, the prosecutrix went to another hotel or rooming house where she registered and spent a day or two; and while there, she filled a couple of dates. The prosecutrix, Jane, and Tommie then went to Fort Smith, Arkansas, in Jane's automobile. Appellant joined them in Fort Smith. Appellant and the prosecutrix then went to Hot Springs, Arkansas, where they spent the night together, and from Hot Springs, the prosecutrix went by bus back home. Jane's true name was Erma Lane Hawkins and she was married to appellant. Though not divorced, at the time of the transportation of the prosecutrix and at the time of the trial appellant and his wife were not living together. He was living at Dogpatch and she was living in Tulsa. While in the course of so-called qualifying questions propounded by the attorney for appellant and in the course of cross examination, the wife of appellant gave other testimony, the substance of the testimony which the government elicited from her was that she had been a prostitute, and that in November, 1955, she used the name Jane Wilson. She did not testify that she ever saw the prosecutrix anywhere; did not testify that she ever saw appellant at Tulsa, at Fort Smith or at Hot Springs; and did not testify to any act performed or any statement or admission made by him. Even though it be said that she was incompetent to testify as a witness against her husband, the error in permitting her to give the testimony which the government elicited from her was harmless and therefore does not require reversal of the judgment.

"AFFIRMED."